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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

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FMC CORPORATION 21CV487(GWC)

Plaintiff Buffalo, New York

v.

SYNGENTA CROP PROTECTION AG) September 28, 2021

Defendant 10:00 a.m.

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ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GEOFFREY W. CRAWFORD
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G

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10:07:34 THE CLERK: Civil action FMC Corporation v. Syngenta Crop Protection AG, docket No. 21CV487. This proceeding is scheduled for a motion hearing. Counsel, please state your name and the party you represent for the record. Starting with the Plaintiffs, please

10:08:01 MS. HILLIKER: Good morning, your Honor. Julia Hilliker from Hodgson Russ on behalf of FMC, and I have with me Dane Butswinkas and Richard Moore.

10:08:11 THE COURT: Your last name?

10:08:12 MS. HILLIKER: Hilliker, H-i-l-l-i-k-e-r.

10:08:16 THE COURT: Great, thank you.

10:08:18 MR. BUCKI: Yes. Good morning, your Honor. Craig Bucki, B-u-c-k-i from the law firm Phillips Lytle, LLP in Buffalo. And from Kirkland Ellis, Ryan Moorman and Mark Premo-Hopkins.

10:08:35 THE COURT: I really appreciate the papers. They were very carefully done and very thorough. And I've had a chance to go through them all. I appreciate the trip that many of you have made. We have two hours set aside. I don't know that we will need it all. But there is plenty of time for everyone to say everything they have to say. There is absolutely no rush this

10:08:55 morning. And why don't I turn things over to the moving
10:08:59 party?
10:09:08 MR. MOORMAN: Thank you, your Honor. Ryan
10:09:11 Moorman on behalf of the defendants. Thank you, your
10:09:16 Honor. I am Ryan Moorman on behalf of the defendants.
10:09:20 Your Honor, the claims in FMC's Complaint arise out of a
10:09:23 2015 Collaboration Agreement that it entered with
10:09:27 Syngenta to research and develop new Herbicide
10:09:33 Compounds. Section 9.7 of that Complaint, requires the
10:09:35 parties to confidentially arbitrate any dispute that
10:09:38 arises out of the agreement, including the claims that
10:09:41 FMC brought here. FMC knows this, your Honor. Two
10:09:45 years ago, FMC initiated arbitration bringing similar
10:09:50 claims to the claims that FMC brought in this case and
10:09:53 seeking overlapping relief with the relief that FMC
10:09:58 seeks here. But while that arbitration was pending,
10:10:00 your Honor, FMC wanted to exact additional concessions
10:10:05 from Syngenta, so its CEO sent a letter to -- Syngenta's
10:10:11 CEO asking it to cave to additional demands or else
10:10:15 there would be very public litigation that it implied
10:10:19 Syngenta would want to avoid. Syngenta, of course,
10:10:22 refused the demands of FMC, and this litigation
10:10:28 followed. Your Honor, we've already initiated an
10:10:31 arbitration demand in the AAA trying to avoid the claims

10:10:34 that FMC brought in this case. And this Court should
10:10:37 compel arbitration for two independent reasons. The
10:10:40 first of the two independent reasons is that section 9.7
10:10:44 of the Collaboration Agreement squarely covers the
10:10:48 claims that FMC has brought here. Second, and
10:10:51 independently, your Honor, Second Circuit precedent
10:10:54 requires the Court to let the arbitrators decide the
10:10:59 question of arbitrability when the parties incorporate
10:11:02 the AAA rules in their arbitration clause, which is what
10:11:07 the parties did here.
10:11:08 Let me start with the first of the two
10:11:10 independent reasons, your Honor. The arbitration clause
10:11:12 that the parties have in this case, which calls all
10:11:16 claims that arise out of a Collaboration Agreement, the
10:11:21 Second Circuit calls that the paradigm of a broad
10:11:24 arbitration clause. And when parties choose a broad
10:11:28 arbitration clause, there is a presumption of
10:11:30 arbitrability that applies to every allegation that
10:11:34 touches or implicates the parties' agreement. When
10:11:35 there is that broad arbitration clause, courts can only
10:11:39 decline to compel arbitration if the parties seeking to
10:11:44 avoid it, here that is FMC bears the burden of defeating
10:11:47 the motion, only if they can show with positive
10:11:49 assurance that the parties did not intend to arbitrate

the claims.

FMC can't meet that burden, your Honor. It brings three types of claims. The first buckets are what I will call inventorship claims under Section 256. Under 256, they seek to add FMC employees as inventors on patents that have already issued to Syngenta. And the basis of FMC's claim, your Honor, is that work it performed under the Collaboration Agreement that has the arbitration clause, entitles it to that additional ownership of the patents.

THE COURT: Can I ask you a question about that?

MR. MOORMAN: Of course, your Honor.

THE COURT: Are you satisfied that the arbitration panel can give FMC that relief, if it's appropriate on the merits.

MR. BUCKI: Yes, your Honor. That is absolutely the case. There are two cases that we had in our brief that are directly on point. I can skip ahead to those, your Honor.

THE COURT: I wondered how it works since the panel works in total secrecy and they would issue a ruling that would go to the patent regulator.

MR. BUCKI: That's absolutely, correct, your

Honor. There is the *Dansko* case, SDNY case, just like in FMC, in this case, it involved a Collaboration Agreement between two parties. The Plaintiff, in that case, alleged that the defendant had misappropriated confidential information by including that confidential information in its patent filings. The Plaintiff in that case brought inventorship claims under the same statute that FMC brought here and the Court compelled arbitration of the inventorship claims. *Invista v. Rhodia*, 503 F. Supp 2d 195, that is a district of DC case. This actually lays out the process that the arbitration panel would follow and the parties would follow thereafter. The way the Court in that case described an is an arbitration clause reflects an agreement of the parties to abide by the order of the panel. So what the Court says is the parties can simply or would be required to simply implement between themselves the order of the panel. If that ruling was to add inventors to the patent, the parties have a process to do that. And if they refused, you could enforce that judgment in Federal Court, and that would have the force of law just like your Honor, to comply with that. Those cases, your Honor, really are on all fours. They address the exact same claims that FMC

10:14:17 brings here, and they resolve the question clearly in
10:14:19 favor of Syngenta. Holding that inventorship claims
10:14:22 under 256 are arbitrable, and the remedy that a party
10:14:26 like FMC seeks can be implemented through the
10:14:30 arbitration proceeding. The threshold question, your
10:14:33 Honor, before we get to that is whether the claims arise
10:14:36 out of the Collaboration Agreement. And they clearly do
10:14:39 in this case. As you saw in the Complaint, your Honor,
10:14:42 FMC details the factual basis of their right to
10:14:46 inventorship by explaining the work they performed under
10:14:49 the collaboration. They explained what the
10:14:51 collaboration required. The collaboration between the
10:14:54 parties. And they expressly say that the creation of
10:14:59 the EGP79, that is the compound in question, was the
10:15:02 result of the collaborative relationship between FMC and
10:15:07 Syngenta as contemplated by the Collaboration Agreement.
10:15:12 It implicates the Collaboration Agreement and it arises
10:15:17 out of the Collaboration Agreement. FMC does more than
10:15:17 that, as you saw in their Complaint, and as we detailed
10:15:18 in our motion, they spent 22 consecutive paragraphs
10:15:22 explaining the legal rights under the Collaboration
10:15:25 Agreement, explaining why that entitles them to the
10:15:27 ownership they claim they are entitled to in these
10:15:32 Complaints. These claims are arbitrable. This is what

and arbitration clause that is intended to cover all claims that arise under an agreement are supposed to require arbitration of.

There are two more claims that FMC brings. They bring a breach of contract claim. A breach of contract that, obviously, implicates the agreement. And they also bring a trade secret claim, but this just turns on resolution of the contract claim. Under their theory of the case, we used the confidential information in a way that the contract prohibited us doing. Resolving that question requires resolution of the contract claim. So the trade secret claim is almost co extensive with the contract claim, both of those obviously arise out of the agreement.

So I just touched on those two cases, your Honor, that I think are really on all fours here that require the result or are very persuasive authorities to why your Honor should compel arbitration. I think it's important to point out, your Honor, FMC does not dispute these points. They don't dispute the meaning of the agreement, that Section 9.7 is a broad arbitration clause that creates a presumption of arbitrability. FMC does dispute the law that the broad arbitration clauses -- excuse me -- that broad arbitration clause requires

arbitration unless they can show with positive assurance that the parties did not intend to arbitrate the clause. And FMC does not dispute the facts. They are not contending that the allegation do not arise out of the collaboration. And they don't make that because they can't. They invoked the personal jurisdiction in there. The basis of personal jurisdiction in their Complaint is to the -- they consent to the extent that Syngenta has in the Collaboration Agreement. The Court would otherwise would have personal jurisdiction over Syngenta. But Syngenta consented to jurisdiction over any claim that arises out of the Collaboration Agreement. So to bring this Complaint in this Court, FMC already alleges this Complaint, the one it filed in this Court, arises out of the Collaboration Agreement. You can't reconcile the two agreements.

Second, your Honor, as I've already mentioned, FMC has already brought overlapping claims in arbitration. And Syngenta filled out an arbitration demand that the parties have been awarded.

THE COURT: I've read that. I just wondered, I got glimpses in the papers of where the panel is in its process, but I wonder if you could walk me through it.

10:18:03 MR. MOORMAN: Sure. Your Honor, as we
10:18:04 mentioned in the Complaint, the parties brought
10:18:08 competing arbitration demands. Syngenta alleged that it
10:18:08 was entitled to commercialize the compound that the
10:18:13 parties developed. FMC brought allegations that it was
10:18:14 the owner of the IP and that Syngenta needed to assign
10:18:17 its ownership to FMC. Different causes of action, but
10:18:23 overlapping relief. And similar bases to the bases of
10:18:29 relief that FMC seeks here. We arbitrated that claim in
10:18:31 September of last year, the panel has recently issued an
10:18:35 interim award finding in favor of Syngenta on the
10:18:37 contract issues. And it's now, the panel, is moving to
10:18:42 the what it is calling the licensing phase. It's
10:18:44 basically a damages or relief phase where it is going to
10:18:46 create the licensing under which Syngenta is going to be
10:18:47 commercializing those compounds.
10:18:48 THE COURT: Is there a schedule and hearing
10:18:50 set and so forth?
10:18:52 MR. MOORMAN: Very recently, actually, your
10:18:54 Honor, the panel has retained a neutral expert to assist
10:18:58 it in its case. And I don't know the exact date, I
10:19:01 think the second full week in January, I think January
10:19:04 10th, there will be a four-day hearing to resolve all of
10:19:07 the issues that are outstanding. That includes the

terms by which Syngenta can commercialize these compounds. The panel also said in that order it will resolve the claims -- excuse me that FMC brought in its demands. All of those issues will be resolved after the January of 2022 hearing.

THE COURT: Okay. And are these the lawyers that are involved?

MR. MOORMAN: Yes, that is fair. Different counsel for FMC that did the actual arbitration hearing. FMC has since retained the lawyers in this courtroom today to, I believe, I'll let them tell you the scope of the engagement. I believe they are taking the lead on the hearing, but there is still involvement of the law firm that did the initial arbitration hearing.

THE COURT: So nobody has put the brakes on in the arbitration process. Everybody is charging ahead preparing for this.

MR. MOORMAN: That's correct, absolutely.

THE COURT: All right.

MR. MOORMAN: So let me pick up where I left off, your Honor. So, as I mentioned, FMC is not challenging the premise of FMC's motion. They agree on the law and on the facts. How does FMC try to avoid arbitration of this dispute. They point to section 4.3

10:20:23 of the Collaboration Agreement. And I think the upshot
10:20:25 of their argument is section 4.3 silently overrode the
10:20:34 express language of 9.7, which is the arbitration clause
10:20:38 in this case. Your Honor, there is nothing in section
10:20:41 4.3 that does what FMC claims that section 4.3 did. And
10:20:46 there are a few reasons for that. First of all, all
10:20:49 section 4.3 does, it lays out a dispute or an internal
10:20:53 dispute resolution process that the parties must follow
10:20:56 that only applies, the parties agree, during the term of
10:21:00 the agreement. The agreement has since expired, so the
10:21:02 parties agree that 4.3 has since expired. Under the
10:21:06 terms of that internal resolution party, for example,
10:21:08 the party whose patents are challenged, they get
10:21:12 additional rights, 90-day resolution process, an opinion
10:21:16 of counsel from the other side laying out the basis of
10:21:18 their ultimate challenge, and if the parties can't
10:21:21 resolve that, the party whose challenge gets to choose
10:21:24 during the 90-day period to go to arbitration or court.
10:21:28 There is nothing in 4.3 that remotely suggests or carves
10:21:33 out patent challenges all together from the arbitration
10:21:37 clause in 9.7. First of all, 4.3 still requires
10:21:41 arbitration, even if it applied, it still requires
10:21:44 arbitration at the end of the process. It doesn't carve
10:21:48 out patent challenges. And there is nothing suggesting,

10:21:51 as FMC must shows to resist this motion, that the
10:21:55 parties didn't intend to arbitrate patent disputes.
10:21:59 That is because it requires arbitration of patent
10:22:04 disputes.
10:22:04 THE COURT: I went back and read the two
10:22:06 sections, a couple times. You read them more than I
10:22:09 did. I think the right word is asynchronis, as if they
10:22:13 were inserted by different attorneys with different
10:22:17 areas of expertise. They would have created quite a
10:22:21 headache had we been in the middle of the contract
10:22:25 period, because they really, they are similar roots, but
10:22:29 quite different. Any wisdom from you on kind of how we
10:22:34 got into this funny little pinch.
10:22:37 MR. MOORMAN: So I'm reading it from the
10:22:38 same perspective from your Honor, if I'm making an
10:22:41 inference on how they ended up here. They clearly
10:22:47 reflect the intention to arbitrate the claims. That is
10:22:47 what 9.7 accomplished. 4.3 then assures that you end up
10:22:53 in arbitration if that applies. I think if you're
10:22:55 working together during the collaboration, they wanted
10:23:00 to exhaust an effort to internally resolve the patent
10:23:04 challenge before we get to that dispute resolution
10:23:07 process. What it tried to accomplish what to give the
10:23:09 challenged party just some extra rights as part of the

process. They get that right, they get that 90-day period, and they get that opinion of counsel. And then, at their own election, if they want, instead of arbitrating the claims, they can just go to court instead, during the 90-day window, though. It's not a total superseding arbitration clause in 9.7.

THE COURT: Or mandatory mediation. They call it something different, that is what it looks like.

MR. MOORMAN: Exactly. There are extra rights in an effort to resolve it before we get to arbitration. I think the important point for our motion is the burden is very high to defeat the presumption of arbitrability. They keep using the word positive assurance. I'm taking that to mean expressly state or clearly state that there is an intention not to arbitrate a particular claim. I don't think 4.3 comes close to that. I think 4.3 reinforces the agreement the parties had to arbitrate their disputes. As I think you were getting to, your Honor, the other basis is 4.3 just doesn't apply anymore. The term of the agreement has expired. As your Honor is looking at this agreement deciding whether the claim ought to or ought not to be arbitrated, the only provision that applies is section 9.7. 4.3 is gone, it has no force anymore. 9.7 still

10:24:25 applies. And as I mentioned, your Honor, I don't think
10:24:28 they are disputing their claim arises out of the, under
10:24:32 section 9.7.
10:24:35 So, your Honor, the other basis of FMC's
10:24:39 resistance to our motion is section 9.7(d). 9.7(d) is
10:24:45 an exception to the arbitration provision and section
10:24:48 9.7(b), I think it is. At the outset, I think it's
10:24:52 important to emphasize at most section 9.7(d) only
10:24:57 applies to one of FMC's seven causes of action. 9.7(d)
10:25:03 -- let me explain 9.7. 9.7 is somewhat like 4.3, an
10:25:09 internal dispute resolution that needs to be resolved
10:25:13 before a party can initiate arbitration. I think that
10:25:16 has to last at least 90 days. And 9.7(d) says, upon
10:25:22 breach or threatened breach of the confidentiality
10:25:24 provisions, you can skip that 90-day period and go
10:25:27 straight to seeking whatever relief it is you want to
10:25:29 seek. By its own terms, it can only apply to breach of
10:25:34 contract claim, and it is not going to apply to the
10:25:34 inventorship claims. And we don't understand FMC's
10:25:36 argument to be suggesting that it does apply to the
10:25:39 inventorship claims. It does not work on the breach of
10:25:47 contract claims for reasons we laid out in our brief.
10:25:50 First, your Honor, there is nothing in 9.7(d) that
10:25:54 suggests that you can skip arbitration altogether.

9.7(d) just allows you to skip that 90-day resolution period because there is threatened irreparable harm. You have to get relief as soon as possible. In fact, that is what FMC did in its initial arbitration, it filed an arbitration demand and then it immediately sought injunctive relief from the arbitration panel. A second point why 9.7(b) doesn't work FMC is not seeking the relief that 9.7(b) authorizes. 9.7(b) allows the moving party or the party filing the Complaint to enjoin a threatened breach of confidentiality agreement. So, you know, the hypothetical example is that a party has gotten information that it shouldn't have. You need to run and join that before there is irreparable harm. FMC is not seeking that. The alleged breach of the confidentiality provisions is allegedly including information that FMC claims is confidential in a patent application, in a patent that has since published. That happened --

THE COURT: Years ago.

MR. MOORMAN: Years ago, that happened years. They are not enjoining anything. They are not alleging that the confidentiality of the patent agreement is causing irreparable harm. Even if you that 9.7(d) authorizes.

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10:27:20 THE COURT: From your perspective, 9.7(d) gives you a ticket to get a temporary retraining order in a week's time like that.

10:27:30 MR. MOORMAN: I think it's in arbitration. You can get it from the arbitration panel, we don't think 9.7(d) allows to you run to court, it allows you to run to arbitration before the 90-day expires. And even if it lets you go to court, FMC is not seeking the relief that 9.7(d) authorizes.

10:27:53 Your Honor, at the outset, I said there was two independent reasons that this Court should compel arbitration. The second is the panel doesn't need or, excuse me, I've been in arbitration too long, your Honor doesn't need to decide any of these issues because the Second Circuit precedent on this issue is clear. When parties incorporate the AAA rules into their arbitration clause, it reflects a clear manifestation that the parties intended for the arbitration panel to decide the question of arbitrability. There are several cases that support this proposition. The one I think we quoted in our brief is the *Contec* case, 398 F. 3d 205. There are several other Second Circuit cases that reach the same holding. And it's Rule 7 of the AAA Commercial Rules that says, the arbitrators shall determine their own

jurisdiction. The Second Circuit has said when the arbitration rules that the parties incorporate into their agreement says something like that, the arbitration panel should decide that issue in the first instance. That applies here. That is an independent basis why Syngenta's motion to compel arbitration should be granted.

THE COURT: I think I know the answer to this. But the remedy, if not this panel, but some panel goes crazy, and, obviously, is off the area that they are supposed to act, then the remedy is really post award through some sort of attack to the confirmation process.

MR. MOORMAN: That is 100 percent right exactly. They have a legal basis to argue the arbitration panel got it wrong. There are remedies in district courts to make that point and get it vacated, as you know, if the arbitration panel goes off the reservation.

THE COURT: We see it with compelling parties to arbitrate, that is a tough question and that gets decided later after the award.

MR. MOORMAN: Exactly right. Alternatively, if the panel decides it doesn't have the authority to

10:29:53 arbitration, it would just kick back to Federal Court,
10:29:56 right? There are routes back to court, but there will
10:30:00 be a route back to court.
10:30:01 So, your Honor, I want to touch briefly on
10:30:03 the topic of fees. And at the outset, our motion for
10:30:08 fees, I want to say at the outset, Syngenta agrees that
10:30:11 request for fees are really limited to the extraordinary
10:30:15 case where there is a strong inference of bad faith on
10:30:18 the part of the party. In your ordinary case, the
10:30:21 request for fees is determined by, I'll call it the
10:30:24 meritlessness or frivolousness of the Complaint. It
10:30:27 lacks merits, there is no colorable argument that it
10:30:30 applies, and the Court can infer bad faith from it. We
10:30:34 think that is the case here. We think the basis to
10:30:37 resist arbitration is meritless. But we have more in
10:30:41 this case. We actually have evidence of bad faith and
10:30:44 that is reflected in the e-mail that I introduced at the
10:30:49 outset. The week before they filed this Complaint, they
10:30:52 threatened a very public litigation, a very public
10:30:55 litigation. And they threatened this at a time when
10:30:58 there was ongoing arbitration proceedings on the same
10:31:01 basis that Syngenta claims this claim should be
10:31:05 arbitrated, too. This is really the extraordinary case
10:31:08 to where you don't just have the meritless case, but you

10:31:12 have the direct evidence of bad faith that you rarely
10:31:16 ever have in a request for fees. As a result, my client
10:31:20 has expended money and we're all here arguing this
10:31:23 motion. And we believe our client should be given
10:31:26 reimbursement of the fees as a result of FMC's decision
10:31:30 to file this in Federal Court when it knows it shouldn't
10:31:33 and to force the parties to litigate this issue.
10:31:37 If your Honor doesn't have any questions, I
10:31:39 ask for the opportunity to respond to any argument that
10:31:41 FMC has, but I'll turn it over to FMC.
10:31:45 THE COURT: Thank you very much.
10:31:57 MR. BUTSWINKAS: Good morning, your Honor.
10:31:57 Dane Butswinkas for FMC.
10:31:57 THE COURT: Can you spell the last name.
10:31:57 MR. BUTSWINKAS: Sure. B, as in boy, u, t
10:31:57 as in tom, s as in Sam, w, i, n, k, a as in apple, s as
10:32:23 in Sam.
10:32:23 THE COURT: Good morning. Thank you for
10:32:25 coming.
10:32:25 MR. BUTSWINKAS: Let me start out by saying
10:32:28 thank you for having this. It gave me my first win when
10:32:32 I was able to fit into my suit. Let me start with the
10:32:36 easy parts of this.
10:32:37 There are really two routes to be in this

court. One is through the exception to 9.7, with respect to Count 5, the confidentiality claim. I think that is actually pretty straight forward, and I'll end up starting there. And then second is a little bit more complicated, the question of 4.3. Where the contracting parties, and I had the exact same reaction that your Honor did, it looks like two sets of lawyers creating two sets of frameworks to deal with two sets of claims. And it's an easier question, probably, if we were, as you say, were talking about this during the term of the contract. The more complicated question is what happens when the term ends. And I'll talk about that. I don't think it's as easy and straight forward as the defendant suggests. Let me start with the confidentiality claim, which rests on the exception to 9.7. This is a provision that I know your Honor has seen over the years, provisions of this type, where you have an arbitration clause and then you have a carve out for equitable relief.

THE COURT: Right.

MR. BUTSWINKAS: And my experience with those provisions has been those carve outs come in two brands. One is the brand is where we're talking about running to court for temporary relief, temporary

10:34:16 restraining order, preliminary injunction. Something
10:34:23 that is interim to preserve the status quo. That is
10:34:27 brand one. And brand two is an exception to allow you
10:34:30 to go to Federal Court to bypass the arbitration process
10:34:34 to seek a permanent merits decision, like a permanent
10:34:39 injunction, like specific performance or like some other
10:34:43 remedy crafted by pursuing party. Your so question
10:34:46 here, I think, is really which brand is this. And I
10:34:49 think the language of 9.7(d) answers that. Here is what
10:34:58 it says. "The dispute resolution procedure set forth in
10:35:02 this 9.7 is mandatory and neither party shall institute
10:35:08 legal proceedings," go to court, "until it has been
10:35:13 exhausted." Let's talk about that sentence. The
10:35:15 preceding is, not just the 90-day negotiation period,
10:35:18 the whole process, including the arbitration. You've
10:35:21 got to exhaust that unless the exception applies, and
10:35:26 the exception is this. Notwithstanding the foregoing
10:35:30 the exception, the parties acknowledge that any breach
10:35:33 of the confidential obligation, that is our Count 5 in
10:35:37 the Complaint, in this agreement will result in
10:35:40 irreparable harm, standard language that we always see,
10:35:43 for which the disclosing party shall not have an
10:35:46 adequate remedy at law and accordingly, upon a breach or
10:35:51 a threatened breach, so not as they just represented to

10:35:54 the Court, something future looking, but also a breach
10:35:57 that already happened, like we allege here, of the
10:36:02 confidential obligations here in the disclosing party
10:36:06 shall be immediately entitled to pursue without showing
10:36:09 or proving any actual damage sustained, (2) a temporary
10:36:15 restraining order, like they talked about, preliminary
10:36:17 injunction, like we talked about, permanent injunction
10:36:20 or an order compelling specific enforcement or other
10:36:25 appropriate remedies as determined by the disclosing
10:36:28 party or to prevent the breach of such confidentiality
10:36:34 obligation. Brand two, the carve out that allows you to
10:36:38 go to court for a confidentiality breach to seek
10:36:41 permanent relief. A permanent injunction, specific
10:36:44 performance, or remedies of our choosing. Now, we seek
10:36:48 all of those here in our claim. This one is pretty
10:36:51 easy. Their argument is that the bypass is just the
10:36:55 bypass of the 90-day negotiation period. That is not
10:36:58 what it says. What it says is you have to exhaust all
10:37:02 of those procedures, the negotiation, the management
10:37:06 meetings, the arbitration, all of that. You have to do
10:37:10 that first unless. Unless what? You allege a
10:37:13 confidentiality violation for a breach or a threatened
10:37:16 breach, and you ask for remedies, not just interim
10:37:21 remedies, but permanent injunction, specific performance

10:37:24 or remedies crafted by the suing party. That seems
10:37:27 pretty easy and straight forward. And I don't really, I
10:37:34 mean, I'm probably not going to respond substantively
10:37:38 to, unless your Honor requires, the idea they should get
10:37:41 fees for this. This is a pretty clear argument. This
10:37:44 is a clear carve out, it allows you to go to court for a
10:37:47 confidentiality breach. That is exactly what we allege
10:37:52 here, because that is exactly what happened.
10:37:54 Now, the other question is a little bit more
10:37:58 complicated, 4.3. Now, what it looks like happened, and
10:38:02 I will say that, I will give him credit, we do agree
10:38:07 with a lot of what he said. There is clearly an
10:38:09 arbitration clause in the agreement, no question. There
10:38:13 is clearly a legion of cases that say when you have just
10:38:15 an arbitration clause, you out to be thinking
10:38:19 arbitration. There is that. Our contract is a little
10:38:21 different than that. We also agree that all of these
10:38:24 claims arise out of the Collaboration Agreement. If we
10:38:27 came and tried to argue something different to you, we
10:38:30 couldn't say it with a straight face, even with a mask
10:38:33 on.
10:38:33 THE COURT: Right.
10:38:34 MR. BUTSWINKAS: On those points, we do
10:38:37 agree. The contract here is a little different than

your traditional contract in that it does have an arbitration clause to deal with some disputes, but it also has this separate clause, 4.3, to deal with a specific type of dispute - patent challenges. It's a defined term in the agreement. It's an Article 1, I think section CC lays it out. And what it does is it says, in the first instance, the direction to the parties is to file a patent challenge in Federal Court or before the trademark office. That is exactly that language. It's not as he says, an arbitration clause. It's a go-to-court clause. And so you have a contract here that has two competing paradigms to deal with different types of disputes. One of which it defines specifically in the contract. And so when you look at 4.3, you really see two things about the intended purpose. No. 1, a presumption, not surprisingly, that patent challenges will be favoring courts, unless the defendant decides, okay, I'm fine going on arbitration then.

THE COURT: As the challenged party, as they say.

MR. BUTSWINKAS: Correct, correct. So it favors court, unless the defendant doesn't want the protection and expertise of a court dealing with patent

challenges. He turned it upside down. It is not arbitration, it's Federal Court or trademark, unless the defendant wants it to arbitrate. That is how it works. So the first thing you see in 4.3 is the intent of the parties to craft a provision that favors court for that particular type of case, patent challenges.

THE COURT: And not just any court, Delaware.

MR. BUTSWINKAS: Correct, correct. And the second thing you see in 4.3, is an intent to, during the term, maintain the collaborative process, right? It's a Collaboration Agreement, if we have a dispute, let's get together and try and work it out. Let's get an opinion of counsel to share why do you think what you think about the patent challenge. If that doesn't work out, you're directed to file in court, as you say, in Delaware or the trademark case. And the way out of that, and the way back to arbitration, the defendant decides it wants to arbitrate instead. And that would not be a surprising process during the term to have those collaborative features. Notably 4.3 does not cross reference 9.7 at all. And 9.7 does not cross reference 4.3 at all. Nor is there any language in the agreement that sheds any light on the question of what

10:41:16 happens when the term ends. There clearly is a
10:41:23 presumption in the agreement that patent challenges will
10:41:25 be handled by courts, not arbitrators. And you see that
10:41:29 not only in 4.3, but in the definition of "patent
10:41:33 challenges." The examples that are given in patent
10:41:37 challenges are two things, a court action and a
10:41:39 trademark court action. So they are thinking about this
10:41:43 brand of dispute being handled by a court. And, so,
10:41:49 you're left with the unenviable question what happens
10:41:54 when the term is over.
10:41:55 THE COURT: Right.
10:41:56 MR. BUCKI: Because during the term, kind of
10:41:58 easy. What happens when it's over? The result that
10:42:04 they propose is really at odds with the intent that the
10:42:09 crafters of this contract presented, namely favoring
10:42:14 courts for patent challenges. An intent, it's only a
10:42:23 hint, it is not a tidal wave of evidence showing that
10:42:26 intent. But it's a pretty clear hint in 4.3 and in the
10:42:26 definition of patent challenges that the people who
10:42:32 wrote the agreement favored courts for patent
10:42:34 challenges. And not a surprising intent, frankly. But
10:42:38 that is clear.
10:42:40 But, again, it's not an avalanche of
10:42:43 evidence. So one wonders whether is there anything else

10:42:47 out there that would shed any light on how the parties
10:42:50 actually thought this provision worked. And the good
10:42:54 news is that there is. The defendants propose that what
10:43:02 happens is you have 4.3 that directs the parties to file
10:43:06 in court if the collaborative process doesn't work. And
10:43:12 has an exception that the defendant can use to put it
10:43:14 back into arbitration. So a particular circumstance
10:43:17 that allows a defendant to escape mandatory court for
10:43:22 patent challenges. And their argument is, when the term
10:43:25 ends, that suddenly that intent is all washed away, the
10:43:29 clear favoring of court is down the drain, and you go to
10:43:33 exactly the opposite where it's arbitration in all
10:43:37 circumstances. That is a far cry from 4.3. And we
10:43:43 argue, undermines the intent. But the evidence out
10:43:49 there about how these provisions should work together or
10:43:54 not work together is best seen in what they've done. On
10:43:59 February 21st, 2020, they instituted a patent challenge
10:44:05 at the Patent and Trademark Office. On August 31, 2020
10:44:10 they instituted a patent challenge at the European
10:44:14 Patent Office. In September of 2020, they instituted a
10:44:19 patent challenge at the China National Intellectual
10:44:26 Property Institute, the equivalent of our PTO. All of
10:44:29 these are unmistakably and indisputably patent
10:44:34 challenges as crafted in Article 1 of the agreement, no

10:44:38 doubt about it. All of them happened after the term,
10:44:46 May 31st, 2018 of the contract expired. And all at are
10:44:49 at odds with the interpretation of the contract they
10:44:53 present to your Honor today. Because if they are right,
10:44:55 when 4.3 expired and they filed patent challenges, which
10:45:00 they spent a long time from the podium today, you get a
10:45:04 judgment, and you go to court, he is right about that,
10:45:07 by the way, all three of these would be in arbitration.
10:45:10 9.7 would govern, and they would have had to go through
10:45:13 that procedure, and it survived the end of the contract,
10:45:18 and all three of those would be in arbitration. What
10:45:23 does that tell you? It tells you they don't really
10:45:26 think that is how it worked.
10:45:27 THE COURT: Neither side can be accused of a
10:45:32 great deal of consistency.
10:45:35 MR. BUTSWINKAS: Right. Foolish thinkers
10:45:38 can (inaudible) of small minds. I guess what I would
10:45:40 say, when they sweep 4.3 to favor courts, to jump to 9.7
10:45:46 and do the opposite for all time, you'd need some
10:45:49 language in the contract that would suggest that you
10:45:51 should do that. You would see a cross reference in 4.3
10:45:54 or see a cross reference in 9.7 or you would see
10:45:58 something somewhere that says when 4.3 runs out, back to
10:46:03 the general arbitration clause. You don't see any of

10:46:06 that. And so you're forced, your Honor, with all due
10:46:09 respect, to put together tea leaves. And what do you
10:46:14 have? Some intent that is gleaned from 4.3 that favors
10:46:20 courts, and you have some intent that can be gleaned
10:46:21 from Article 1 CC that refers only to court. And you
10:46:25 have their conduct, which gives you three examples where
10:46:30 what they did is exactly consistent with what, how we're
10:46:35 saying the contract works.
10:46:40 And I don't think there is much dispute, but
10:46:42 I'll cover it for a minute with respect to claims one
10:46:47 through four, whether they are patent challenges or not.
10:46:51 They are quintessential patent challenges. They
10:46:54 challenge the owner of the patent, who the inventors
10:46:57 are. I don't think there is any debate about that. I
10:47:01 also don't think there is any debate about whether the
10:47:04 three patent challenges they institute meet the
10:47:07 definition of 1.1 CC. I don't think there is any debate
10:47:12 about that. And I don't think there is any debate about
10:47:14 the types of proceedings that are given as examples in
10:47:17 the definition of patent challenges, mainly only court,
10:47:21 only Patent and Trademark Office, no reference to
10:47:24 arbitration at all.
10:47:26 Now, their contention, and I think there is
10:47:28 some confusion because these parties have been at each

other. I have not been involved, but at each other for a long time on a lot of different fronts all around the world.

THE COURT: Right.

MR. BUTSWINKAS: But make no mistake about that. They say these claims that we're bringing here are either covered or almost covered in that arbitration. And that is not so. I am involved in that arbitration now. And so I know what those claims are and those are really a contract dispute over commercialization rights. There is no confidentiality claim. There are no patent claims. In fact, it's not even possible to have brought these claims in that context because we didn't -- we, FMC, didn't even know about them until after discovery had closed in that arbitration, and, literally, on the eve of the evidentiary hearing. And as we proceed from here to a final evidentiary hearing in January, just in a few months, it's all about crafting the terms of a license agreement. It's not going to decide anything about patent rights or decide any of the claims that we have in our Complaint.

THE COURT: Can I take you to sort of a strategic question. One, it's a little hard to see why

what you want to do, I guess, you want to go forward in this court in the conventional way and get a discovery order in place and start taking deposition, you know, the normal drill that lasts 24 months or something like that.

MR. BUTSWINKAS: Yes.

THE COURT: Did you want me to stay the arbitration or you want to proceed with it?

MR. BUTSWINKAS: No, the arbitration is completely different issues. It's not going to affect what happens here.

THE COURT: How about we wait and find out what they do? In other words, you're going to lose in this court, you shall four, five, six months, you should get a decision in April or May, and then we will know, you don't have to guess.

MR. BUTSWINKAS: Not a crazy idea, your Honor. Let me try and convince you that you don't need to wait that long. A couple things happened in this arbitration that we're talking about that I think really clearly answers this question of whether there is some sneaky overlap and we're trying to escape that proceeding to get a new one, because that is not the case, but I get the argument. There was discovery that

10:49:54 we sought at the very beginning of the case because, as
10:49:57 lawyers do, they come in and they want broad discovery,
10:50:01 even in an arbitration, which used to be marketed as the
10:50:06 cheaper way to a decision, no longer.
10:50:08 THE COURT: Quicker they get that.
10:50:10 MR. BUTSWINKAS: Not much quicker. We asked
10:50:13 for discovery, the prior lawyers, and what they asked
10:50:16 for were the Syngenta patent applications. And
10:50:20 documents related to their patents, which would have
10:50:23 included the very patents that are at issue here. And
10:50:29 the response to that from the lawyers that represented
10:50:32 Syngenta was that any patents filed by Syngenta are
10:50:40 irrelevant to FMC's claims because FMC's demand does not
10:50:46 allege that Syngenta breached the Collaboration
10:50:50 Agreement by preparing or filing patents. In other
10:50:52 words, exactly the claims we have here. They said we
10:50:55 shouldn't give the documents because those claims are
10:50:58 not in that arbitration, and in fact, they go on and
10:51:00 say, this is the response to our document request, they
10:51:03 go on to say, "no allegations relate to Syngenta's
10:51:06 patents." And the panel agreed with them. And it
10:51:13 ordered no discovery of that information finding that
10:51:18 Syngenta had responded that its patents or patents
10:51:23 applications are not relevant to FMC's demand. And it

10:51:28 concluded and it says in their order, the panel finds
10:51:29 that none of the claims asserted by FMC against Syngenta
10:51:33 alleged that Syngenta breached the Collaboration
10:51:36 Agreement by filing its own patent allegations. And so
10:51:40 when we tried to seek --
10:51:41 THE COURT: That is in the -- I'm sorry.
10:51:44 That is in the interim award.
10:51:50 MR. BUTSWINKAS: Your Honor, let me present
10:51:52 copies to everybody.
10:51:55 THE COURT: Sure.
10:52:03 MR. BUTSWINKAS: Well, Judge, unfortunately,
10:52:04 I only have one copy. I'll give that to you, and I'll
10:52:08 give them my copy when I'm done. May I approach?
10:52:08 THE COURT: Sure.
10:52:11 MR. BUTSWINKAS: This is the letter I
10:52:16 referred to, and this is the discovery order.
10:52:20 THE COURT: Okay. This is one I haven't
10:52:22 seen. All I've seen is the big interim award.
10:52:26 MR. BUTSWINKAS: Yes, it's not in the
10:52:27 interim award, correct.
10:52:30 THE COURT: And you guys have a copy of it?
10:52:32 You've seen this before?
10:52:36 MR. BUCKI: We have seen it before because
10:52:38 we litigated the case.

10:52:40 MR. MOORMAN: If it's the interim award that we --

10:52:43 THE COURT: It is order No. 4, moving on letter briefs regarding discovery disputes.

10:52:46 MR. MOORMAN: I am sure we have seen it before. It's find if Mr. Butswinkas wants to give us his copy, I trust him.

10:52:48 MR. BUTSWINKAS: I'll give you mine complete with highlighting. I apologize for not having copies.

10:52:54 MR. MOORMAN: I appreciate that.

10:52:56 MR. BUTSWINKAS: I think that these documents add to what we already said about this. It makes clear that everybody's position was that Syngenta's patent filings were not at issue in the arbitration and that is how they fought discovery. The panel agreed with them because the panel said those are not at issue here. The relief that is pending has nothing to do with the inventorship of these patents, which are counts one through four, and has nothing to do with the confidentiality issue, which is Count 5. And I don't think that they can stand here at the podium and say that it is conceivable that in January, when we have our hearing, and then they take the time that they take to issue the decision. It's not, I'll represent to the

10:53:47 Court, in my mind, and I invite them to say to the
10:53:50 contrary, it's not conceivable that they will find that
10:53:53 these patents are missing inventors. That is Count 1
10:54:00 through 4 of our claim. And it's not conceivable that
10:54:04 they will say there is a breach of confidentiality by
10:54:06 filing that information in their patents. Those are not
10:54:11 claims before the tribunal. And if they thought that,
10:54:13 by the way, why would they have run out and filed
10:54:14 another arbitration and then asked for it to be stayed.
10:54:17 If they truly thought that was the relief that was
10:54:19 already at issue that was coming down the pike in
10:54:22 January, you would think that there would be no need to
10:54:25 have gone out and filed an arbitration that mirrored
10:54:29 what we filed here. No need. In fact, what you would
10:54:32 have done is you would have gone to that tribunal and
10:54:35 say, hey, these guys have filed a case in Federal Court
10:54:39 and it's covering all of our claims, and we need to fix
10:54:43 that. They haven't done that. They put the tribunal on
10:54:47 notice and just let it sit. And they would have raised
10:54:51 a fit about it and made sure that the panel said
10:54:54 something that they could bring to your Honor, but they
10:54:56 haven't done that. And that is pretty telling.
10:54:59 THE COURT: I don't understand what you lose
10:55:01 other than a couple of months by waiting for the panel's

10:55:05 ruling. My experience with significant arbitrations
10:55:09 like this one is, however I rule on the arbitration
10:55:12 issue, the unhappy party will take an immediate appeal
10:55:17 and go right to the Second Circuit. This thing is not
10:55:20 going to be, if you're all correct on everything you
10:55:23 say, you're really not going to be on tract and sort of
10:55:26 moving down the litigation from a year from now.
10:55:33 MR. BUTSWINKAS: It's hard to argue. We
10:55:36 loose a little bit expediency and I'd like to list out
10:55:41 10 arguments that why that is not a good thing to do. I
10:55:44 think it's clear from the record and the order, but if
10:55:48 you don't see that, what you're suggesting is a very
10:55:51 reasonable course.
10:55:51 THE COURT: Thanks. That probably takes us
10:55:54 to the question of who decides arbitrability.
10:55:57 MR. BUTSWINKAS: We ended at the same spot,
10:55:59 and I'll touch upon that now. They came to you to ask
10:56:05 you to decide this question with their motion to
10:56:10 dismiss. And they didn't raise, when they came to as
10:56:14 you this question, the idea of sending this to the
10:56:17 arbitration panel. They didn't raise that until the
10:56:20 reply brief. And there is case law that says that
10:56:28 waives that argument. And they cite a bunch of cases
10:56:32 that say when an arbitration clause is kind of the heart

10:56:35 of a contract that is sort of tells people, you know
10:56:39 what, the red flag here when you have a dispute. Then
10:56:42 you go to the panel or a panel or an arbitrator and get
10:56:46 them to figure out whether something is out or not.
10:56:49 This is a little different. And I agree with the case,
10:56:52 we're not going to go to the cases one by one. It's
10:56:56 boiler plate. It reminded me when I was a young
10:57:00 associate and I would do a summary judgment and cite 50
10:57:04 cases that say if there is no dispute of material fact,
10:57:09 there is no issue here. Here we have two different
10:57:15 clauses dealing with two different types of disputes.
10:57:17 You have the arbitration clause on one hand, and another
10:57:20 clause that speaks to a specific type of dispute, patent
10:57:23 challenges. One favors arbitration, and one favors
10:57:27 courts. That is very different than the string cite of
10:57:31 cases that only have one clause. And in that world
10:57:35 where they've come and asked the Court to decide, and
10:57:38 when you do have a contract that has competing
10:57:41 provisions, those boiler plate cases don't look so good
10:57:44 anymore. Because it looks like what you've been asked
10:57:47 to do is figure out the answer when you have competing
10:57:50 clauses in the same contract. And that is what you have
10:57:53 here. And so that is basically my answer to that is
10:57:59 where you have a contract, and I have a case, because

10:58:03 there is not a case that is on all fours with this
10:58:06 situation. There are ton of cases where contracts,
10:58:10 single arbitration clause, send it to the panel, right?
10:58:14 That is not this.
10:58:15 THE COURT: Right.
10:58:16 MR. BUTSWINKAS: You have two different
10:58:18 clauses that deal with different types of disputes, very
10:58:21 differently. One with arbitration, one favoring courts.
10:58:25 That is a role the courts should decide and not send it
10:58:28 to the panel. Your Honor, unless you have any other
10:58:30 questions.
10:58:31 THE COURT: No, it was very helpful. You
10:58:33 didn't lose your step during your 18 months of Covid
10:58:39 quarentine.
10:58:39 MR. BUTSWINKAS: I did loose a little button
10:58:41 this morning, but, thank you.
10:58:42 THE COURT: Thank you. Glad to have you
10:58:43 back. All right. Mr. Moorman, I'll go to you.
10:58:59 MR. MOORMAN: I want to go to a few points
10:59:02 that FMC raised. I want to go to the question that your
10:59:06 Honor left off with, the question of whether this claim
10:59:09 is arbitrable. I think it very important to show that
10:59:14 FMC expressly agrees with our cases. Those cases
10:59:18 squarely hold that if the arbitration incorporates the

10:59:21 AAA rules, then the arbitration panel has to decide
10:59:24 whether there is jurisdiction for an arbitration panel
10:59:25 to resolve the case. I'm not sure I fully follow the
10:59:29 argument that there is two separate clauses or this
10:59:33 somehow undermines these cases. They admit they don't
10:59:37 have a case that suggests that. It's whether the
10:59:42 agreement reflects the agreement to arbitrate. And the
10:59:46 basis of our argument is 9.7 authorizes resolution of
10:59:48 this dispute in arbitration. Because that clause
10:59:51 incorporates the AAA rules, the arbitration panel
10:59:55 decides that in the first instance. Now, they are going
10:59:58 to be free to make all of the arguments that they made
11:00:00 before your Honor that 4.3 is some special silent carve
11:00:05 out of 9.7, that our argument before the panel, which
11:00:09 will be 9.7 requires this case to be arbitrated, they'll
11:00:13 be able to make the arguments that 4.3 actually shows
11:00:17 9.7 doesn't allow that, and it has to be made to the
11:00:20 arbitration panel and that resolves the issue, your
11:00:23 Honor.

11:00:25 I want to, I guess I'm going to go in
11:00:28 reverse order, perhaps, because that is freshest in my
11:00:32 mind. There was a lot of focus by FMC on whether the
11:00:38 causes of action pled in the arbitration, there are
11:00:43 actually two arbitrations, right? Whether the causes of

11:00:45 action were pled in the main arbitration we've been
11:00:48 talking about. And the suggestion FMC was making is if
11:00:53 the causes of action were not pled in that arbitration,
11:00:56 then these cases can be decided in Federal Court and not
11:00:59 in arbitration. That is not the reason we're citing the
11:01:02 arbitrations that FMC initiated. It's not our argument
11:01:06 that FMC has brought the exact same causes of action in
11:01:11 both disputes. It's not that FMC is going to have its
11:01:16 claims that it brings here resolved by the arbitration.
11:01:24 Those are not the arguments we are making. The point
11:01:25 we're making, FMC's initiation of arbitration. They
11:01:29 filed an arbitration seeking assignment of patent
11:01:34 rights. They argued to that arbitration panel as they
11:01:35 argued in their Complaint that they are entitled to
11:01:37 ownership over Syngenta's patents. The point is not
11:01:40 that the panel is going to decide the issues before your
11:01:43 Honor in this Complaint. The point is it supports, it
11:01:47 shows that FMC knows these claims are arbitrable, not
11:01:51 that they are necessarily going to be resolved. So,
11:01:54 your Honor, you're correct, what we're seeking is to
11:02:00 stay proceedings and see if arbitration will resolve
11:02:03 this. It's not the case that the big arbitration we're
11:02:07 referring to will be the arbitration that resolves it.
11:02:11 We filed arbitration on the same day we filed our motion

11:02:14 to dismiss actually that asked a court issue a
11:02:14 declaratory judgment that resolve all of FMC's claims,
11:02:18 right? And so when you stay the proceedings, as we
11:02:22 request, both arbitrations will play out, the
11:02:25 arbitration that we filed will resolve whether it has
11:02:29 jurisdiction to decide those claims. And if it doesn't,
11:02:34 we'll be back in a couple of months.
11:02:36 THE COURT: I'm a little turned around this
11:02:37 is new or not in the papers.
11:02:39 MR. MOORMAN: It's in the papers.
11:02:40 THE COURT: There are two panels.
11:02:42 MR. MOORMAN: It wasn't clear coming across.
11:02:44 The papers, as parties often do, when there is a
11:02:47 Complaint filed.
11:02:47 THE COURT: Right.
11:02:48 MR. MOORMAN: That the defendant claims was
11:02:51 arbitrable.
11:02:51 THE COURT: Right.
11:02:52 MR. MOORMAN: We filed, basically, the flip
11:02:54 side of FMC's claims in the AAA.
11:02:58 THE COURT: Before the same panel?
11:03:01 MR. MOORMAN: It might end up. It hasn't
11:03:04 been assigned a panel yet. That is an open question of
11:03:08 whether it will go before the same panel or not. Not

clear. Also not clear whether there will be collateral estoppel issues before the existing panel. All of that is unclear.

THE COURT: Okay.

MR. MOORMAN: We have the existing pending arbitration that we have been referencing. And we also have the arbitration demand that we filed that seeks the flip side and seeks a declaration that the inventors are correct. And it seeks a declaration that we didn't breach the contract. We've invoked Section 9.7 as the basis of the AAA's authority to resolve that case. That question will be resolved, right? So, your Honor, our request is to stay this proceeding, as you've suggested you can, that panel will then resolve whether it has jurisdiction over the exact same claims FMC has brought here. FMC's filed counterclaims in that case that mirrored the Complaints that it filed there. If that panel has authority, it will resolve the claim. If it doesn't have authority, it will kick it back here. I don't want your Honor to be under misapprehension about our claims. Whether these claims are arbitrable does not turn on whether the final award in the arbitration we have been discussing will resolve the causes of action that FMC brings here.

11:04:22 THE COURT: Okay. Does AAA have sort of
11:04:27 consolidation process like the Courts?
11:04:30 It's kind of crazy to get six people working
11:04:34 on this.
11:04:35 MR. MOORMAN: We agree, your Honor. It's
11:04:36 obviously, one of the challenges is there is just no
11:04:40 civil -- the commercial rules are much less detailed.
11:04:43 We certainly make the request, right, but it just --
11:04:47 they haven't resolved that yet. We agree it would be
11:04:50 crazy to have six people, especially given the
11:04:55 familiarity and overlap between the two matters.
11:04:58 THE COURT: Right.
11:04:58 MR. MOORMAN: So just a few more points,
11:05:00 your Honor. I think that in arguing that 4.3 prevents
11:05:08 us from arbitrating these claims from being arbitrated.
11:05:12 I think FMC gets the analysis slightly backwards. The
11:05:18 starting point is whether the arbitration clause in the
11:05:21 agreement is broad or narrow, right? That is what the
11:05:23 Second Circuit precedent says. 9.7 they don't contend
11:05:28 or don't dispute is a broad arbitration. That then
11:05:31 triggers the presumption of arbitrability that can only
11:05:36 be defeated if the side that is resisting arbitration
11:05:39 can show with positive assurance that the parties did
11:05:42 not intend to arbitrate their claims. Based on the

11:05:45 argument FMC has made this morning, I think they
11:05:49 effectively conceded they can't, or implicitly admitted
11:05:52 they can't show with positive assurance. I heard
11:05:55 counsel for FMC saying 4.3 sheds very little light on
11:06:00 what the parties' intent was. There is not an avalanche
11:06:04 of evidence. That is the very opposite of positive
11:06:07 assurance that they need to show to overcome that
11:06:11 presumption everyone agrees a clause like the
11:06:15 arbitration clause in 9.7 establishes.

11:06:18 And one more point to follow up on that.
11:06:20 There has been some suggestion what would have happened
11:06:23 during the term. I think your Honor is correct, we're
11:06:26 not during the term, so 4.3 does not have an
11:06:30 application. There is no favoring of court under 4.3.
11:06:34 Rather, the challenging party gets to decide which forum
11:06:37 the dispute is resolved in. If this exact same thing
11:06:42 happens during the term of the agreement, we might
11:06:44 compel arbitration. And 4.3 allows us to. So we're
11:06:49 still in arbitration, even if we're during the term of
11:06:54 agreement. And that is the point I made on my opening
11:06:56 argument here. 4.3 reinforces, it doesn't undermine 9.7
11:07:02 broad arbitration clause. It reinforces that a party
11:07:05 can arbitrate its claims if it wants to.

11:07:08 THE COURT: At least one side can.

11:07:09 MR. MOORMAN: You're right.

11:07:11 THE COURT: One sidedness is peculiar.

11:07:14 MR. MOORMAN: It gives the challenged party the exclusive right.

11:07:17 THE COURT: Functional Plaintiff is stuck with court.

11:07:20 MR. MOORMAN: You're right, your Honor.

11:07:21 THE COURT: Unless the functional Defendant decides to arbitrate.

11:07:25 MR. MOORMAN: You're right, your Honor. You have that exactly right. I want to touch 9.7(d), I believe it is, the exception for breach of confidentiality provisions. As I understand the argument FMC is making, all that a Plaintiff would need to do to defeat the obligation to arbitrate its claims is to plead a breach of contract and to ask for specific performance or any other remedy it wants in the contract. If that were in the actual rule, if that was the actual exception, that would swallow the rule. You could never arbitrate a claim because you could always have some sort of breach of confidentiality claim and you could always include in your prayer for relief some sort of specific performance to abide by the contract or whatever. What you didn't hear from FMC, that they

11:08:19 actually have any risk of irreparable harm or that they
11:08:22 actually pled or are requesting a permanent injunction
11:08:26 related to the alleged breach of the confidentiality
11:08:29 provisions. All of the injunctive equitable relief they
11:08:33 request in their prayer for relief in the Complaint
11:08:38 relate to their other counts to which Section 9.7 does
11:08:41 not apply. So unless your Honor has any other
11:08:42 questions.

11:08:42 THE COURT: I thought about that. And I'll
11:08:44 give you a chance, too, the permanent relief -- that is
11:08:48 really a better question for your friend -- but the
11:08:52 permanent relief on the confidentiality agreement, what
11:08:56 is the right -- the horse is out of the barn, right,
11:08:59 because the material has been filed, it's not going to
11:09:01 be un-filed in these various IP patent regulatory
11:09:07 agencies.

11:09:08 MR. MOORMAN: That's exactly right, you
11:09:10 can't un-ring the bell.

11:09:12 THE COURT: Right.

11:09:13 MR. MOORMAN: It also lays bear this is not
11:09:15 an irreparable harm case. The patents were filed a long
11:09:19 time ago. And the patent was published a long time ago.
11:09:22 And it's not like the patents were filed a long time,
11:09:25 the patent is filed legally. There is no un-ringing of

11:09:27 the bell and no injunctive relief that can prevent the
11:09:31 alleged harm here.
11:09:33 THE COURT: Okay. Thank you.
11:09:34 MR. MOORMAN: Thank you, your Honor.
11:09:40 MR. BUTSWINKAS: Thank you, your Honor.
11:09:42 Your Honor, I did say there wasn't an avalanche. I said
11:09:47 there was a hint in 4.3 and hint in 1.1CC, the
11:09:56 definition of patent challenge, that the agreement with
11:09:58 respect to these types of disputes favored courts.
11:10:04 There is not hint any other direction. What I also said
11:10:04 was there are three cases out there that fit the bill
11:10:07 for what the parties thought the agreement meant when
11:10:11 4.3 expired and that is the three cases.
11:10:15 THE COURT: Brought by Syngenta.
11:10:16 MR. BUTSWINKAS: Right, every one of them.
11:10:18 And they still haven't said a word about that. They
11:10:21 haven't said a word about that. So, what they really
11:10:24 ask for you to do is set one rule for Syngenta, and they
11:10:28 can go to court and institute patent challenges without
11:10:31 regard for this agreement. And one rule for FMC, that
11:10:37 if they institute a patent challenge, they have to the
11:10:43 arbitrate it. While you're right, not everyone is
11:10:46 consistent in the world, that pattern and practice does
11:10:50 shed light on what they thought the agreement meant.

That is point one.

THE COURT: The practice in this case seems to be that both sides assumed for themselves the right to sue and to demand arbitration freely at the same time and then leave it to the court to sort of be a traffic cop and say, yes, to this one, no, to that one. You haven't come here seeking to -- I don't know quite what the body would be. You haven't come here seeking to stop these three regulatory administrative challenges.

MR. BUTSWINKAS: That is a fair question. But it is a question, we do come here seeking a traffic cop. But it is not a road without lanes. And the contract gives lanes. One lane is patent challenges. And one lane is disputes that arise under the contract that are not patent challenges. So there are clear lanes. The second point I wanted to make was, unless, because of the masks I'm not hearing them correctly, basically gave up the argument that the existent arbitration that has been going on for some time that has these hearings in January, are adjudicating the same issues. He said that is not our argument, that was their argument, he said that is not the argument anymore. All we're saying that you can take claims like these and arbitrate them. Well, when we tried to get

discovery on claims like these in that very arbitration, they said they are irrelevant to what we're arguing about. And the panel said, no discovery because no Syngenta patents are at issue. That, I think, answered the question pretty clearly, your Honor's, question, why not wait until January. And I think he all but conceded that you can wait until January, and you're not going to get any result that encroaches on what we're seeking here. And so that question I think has been answered.

THE COURT: And what I'm a little embarrassed to have missed the reference to the new arbitration proceeding, I did. So, from your perspective, that is just a new, where does that fit into our universe of claims?

MR. BUTSWINKAS: Yes. It was a little confusing, I think, from both of us. The second arbitration that he is talking about is not some active of arbitration that has been going on on some other issues. It's an arbitration that they filed in response to our Complaint.

THE COURT: Right.

MR. BUTSWINKAS: The mirror image of our Complaint. And then they went to the AAA and said, please stay that while the Court decides whether it

11:13:23 should be arbitrated or not.

11:13:26 THE COURT: Okay.

11:13:27 MR. BUTSWINKAS: So it really doesn't have
11:13:29 anything to do with, now they are trying to convert your
11:13:32 question into, stay this, and let that second
11:13:37 arbitration proceed. That begs the question of whether
11:13:39 we should be here or there. Is that helpful?

11:13:43 THE COURT: Yes, that is. I feel a little
11:13:46 better if all I overlooked was a demand for arbitration,
11:13:51 that is not as bad overlooking an entire case.

11:13:54 MR. BUTSWINKAS: Yes, exactly. The
11:14:01 contention that the contract has a broad arbitration
11:14:04 clause, and, therefore, see legion of cases. They don't
11:14:08 answer the argument. That it's a different type of
11:14:11 contract that has two different clauses dealing with
11:14:14 very distinct types of disputes. And if you want to
11:14:18 play the, what's broad and what's narrow, if you look at
11:14:21 4.3, it's a pretty narrow arbitration clause, because it
11:14:25 presumes Federal Court or the trademark office, unless
11:14:31 that one instance, that one cited instance where the
11:14:34 defendant decides it wants to arbitrate. So if we want
11:14:37 to play broad or narrow, then both clauses have to come
11:14:41 into play and we're talking about patent challenges.
11:14:44 That the most light will be shed on patent challenges by

11:14:49 looking at 4.3, which specifically addresses patent
11:14:54 challenges. 9.7 doesn't say boo about patent
11:14:58 challenges. Doesn't reference 4.3. It doesn't use the
11:14:59 word "patent challenge," it does not touch upon it at
11:15:01 all. Again, it's not a world where we have a stock
11:15:04 contract that someone pulled off the shelf and they
11:15:06 stuck an arbitration clause in there. That is what the
11:15:09 cases are about, and I don't dispute that.
11:15:12 THE COURT: What does it mean to you, this
11:15:14 sort of philosophical question about what happens to
11:15:22 words after the term expires. From your perspective,
11:15:27 the expiration of 4.3, I should overlook it because it
11:15:32 sort of lingers in the room in a luminous way giving
11:15:36 guidance, even though it's deceased.
11:15:38 MR. BUTSWINKAS: That is a great question.
11:15:39 And what the Court has to decide is what was the intent
11:15:42 of the parties with respect to patent challenges after
11:15:46 the term.
11:15:48 THE COURT: Right.
11:15:49 MR. BUTSWINKAS: Right. And so one is the
11:15:51 language of the agreement, right? And so is there any
11:15:55 language in the agreement that says when 4.3 is over,
11:15:59 you go back to 9.7? In other words, instead of the
11:16:04 presumption of courts, now you do the opposite. You

11:16:07 presume and only presume arbitration. There is no
11:16:11 language in 4.3, 9.7, in 1.1, anywhere in the contract
11:16:18 that would have you do so dramatic that would have you
11:16:22 turn what the parties intended in the first instance on
11:16:25 its head. And so with all due respect, your job is to
11:16:29 divide the intent of the parties with respect to what
11:16:34 happened when the term ran out. And there are a couple
11:16:38 of good things that I think guide the Court on that.
11:16:40 One is the clear presumption that patent challenges were
11:16:48 to be decided by court, not arbitration. There is no
11:16:51 where in the agreement that creates an argument for a
11:16:54 presumption of arbitration of patent challenges. There
11:16:57 is a choice by a defendant in 4.3 during the term, but
11:17:02 that is it. The clear presumption in the agreement
11:17:05 favors courts for patent challenges, and nothing in 9.7
11:17:10 says anything to the contrary.
11:17:11 THE COURT: But if I could pick with you a
11:17:14 little bit. You're sort of taking the parts you like,
11:17:16 but not the parts you don't like. You sued in the
11:17:20 Western District, but if 4.3 lingers on in some sort of
11:17:25 ghostly way, maybe you should have sued in Delaware.
11:17:28 Some parts disappear, and other parts are still here.
11:17:35 MR. BUTSWINKAS: It's a very decent point,
11:17:37 your Honor, and our argument. I guess the way 4.3

11:17:40 lingers is what it shows about the party's intent. And
11:17:44 one thing is clear, I think that they favored courts.
11:17:49 Now, your point may be well taken and we thought about
11:17:53 that point as we were filing.
11:17:55 THE COURT: Yeah.
11:17:55 MR. BUTSWINKAS: And so the thing that cut
11:17:58 against that point was the consent to jurisdiction was
11:18:03 in New York. And when we filed here, because we have a
11:18:08 plant here, and we have a location here.
11:18:12 THE COURT: Is that what it is?
11:18:14 MR. BUTSWINKAS: Yes, sir. And so whether
11:18:16 every single word of 4.3 lingers in a way that effects
11:18:21 materially, the intended point we're making is a really
11:18:24 good question at some point, where the Court would have
11:18:26 to draw the line and whether it would mean Delaware in
11:18:30 the Patent and Trademark Office or not, that is a little
11:18:34 fuzzier to me. But what is clear is favor courts. And
11:18:38 the arbitration component of 4.3, narrow not broad. So
11:18:43 if you want to take the same boiler plate cases and
11:18:47 apply them, and look at 4.3, you'll come out very
11:18:51 differently than the Defendants are suggesting.
11:18:53 And the last thing I would say, and I
11:18:55 appreciate the Court indulging me, I think he argued
11:18:59 that with respect to our breach of confidentiality

11:19:04 claim, Count 5, that you can't allow us to do that
11:19:08 because anybody could just circumvent the arbitration
11:19:11 clause with any type of breach of contract claim of any
11:19:15 kind or any claim of specific performance. That is just
11:19:20 dead wrong. It has to be a breach of confidentiality.
11:19:24 That is not the carve out. The carve out is the breach
11:19:26 of confidentiality. The relief is the types of things
11:19:29 you can go to a court and ask for. And they are all not
11:19:32 surprisingly of the nature and equity. They are all
11:19:37 equitable relief. And sometimes those clauses are
11:19:41 limited to in and around temporary status quo relief and
11:19:45 sometimes they are not. Here they are not. Permanent
11:19:48 injunction, specific performance, and remedies crafted
11:19:55 by the suing party.
11:19:55 THE COURT: What permanent injunction do you
11:19:58 want? I think you want money. I don't think you want
11:20:00 the Court to say what happened to the release of this
11:20:05 information was very wrong and we're sorry it happened
11:20:08 and that is as much as we can say.
11:20:10 MR. BUTSWINKAS: We only ask for the
11:20:12 equitable remedies on two levels. One with respect to
11:20:15 the filings that have already happened. We think the
11:20:18 patents will be reassigned to us because of the
11:20:21 misconduct in the prosecution of the patent. So that is

an equitable specific enforcement remedy.

THE COURT: I get your point. Thank you.

MR. BUTSWINKAS: And second, this is the point they missed, they are in the process of filing these patents around the world. There are more to come and we would get preventative permanent injunction.

THE COURT: For other countries.

MR. BUTSWINKAS: Yes. And, your Honor, unless you have other questions, thank you so much.

THE COURT: No, no, no. Thank you.

MR. MOORMAN: Your Honor, if I could.

THE COURT: You've come a long way. It is a pleasure to talk to both of you. Let me start with picking on you about why as the advocate of arbitration, why did you start in the administrative tribunal.

MR. MOORMAN: That is exactly where I wanted to start. And I realized that as soon as I sat down that I forgot to raise it. So, your Honor, the distinction between the patent challenges we filed and the patent challenges they filed, their patent challenges they make express, as well as their other claims, arise out of the agreement. Our patent challenges did not. Let me explain why. The patent we challenged existed before the collaboration began. We

11:21:36 filed what is called a post-grant review that anyone can
11:21:39 file. It's not limited to Syngenta, any herbicide
11:21:43 company, any person can file a post-grant review. There
11:21:46 is nothing unique to the Collaboration Agreement that
11:21:48 allowed us to file those patent challenges. And the
11:21:53 procedural posture of that case is basically U.S PTO you
11:21:57 issued a patent when you shouldn't have. Right? So
11:22:00 it's not related to work that the parties completed
11:22:03 together during the collaboration when we were arguing
11:22:06 that we were the inventor or you were the inventor, that
11:22:10 is their claim. Our patent challenge that we filed
11:22:13 related to a patent that was issued before the
11:22:16 collaboration began, related to work that did not occur
11:22:20 during the Collaboration Agreement. And involved
11:22:23 nothing to do with Syngenta. It was not a working
11:22:26 relationship that created that patent. It was a patent
11:22:30 over a different herbicide, over a different class of
11:22:33 claims, right?

11:22:34 THE COURT: You couldn't have gone to
11:22:35 arbitration if you wanted to.

11:22:38 MR. MOORMAN: Yeah, we agree that the
11:22:39 arbitration clause wouldn't have allowed us to go to
11:22:42 arbitration, sure, your Honor, that is absolutely
11:22:42 correct, because it didn't arise out of the agreement,

11:22:44 there would have been no basis. But I think that brings
11:22:48 up a very good point. FMC used the analogy of traffic
11:22:53 cop, I think your Honor may have said it too. The
11:22:54 remedy, if they thought we brought it in the wrong
11:22:58 forum, was to move arbitration, like we did here. We
11:23:02 think our positions are completely consistent. We think
11:23:05 our patent challenges were brought in the right forum.
11:23:10 We think this one is brought in the wrong forum. And we
11:23:10 asserted by moving to dismiss and stay the proceedings,
11:23:14 that this should be in arbitration. If they thought we
11:23:15 were taking in an inconsistent position, they can't sit
11:23:20 back on a patent challenge they thought should be
11:23:20 arbitrated, the correct remedy was to move to compel
11:23:22 arbitration or file an arbitration like we did.
11:23:25 THE COURT: Okay.
11:23:29 MR. MOORMAN: I think that is all I have,
11:23:30 your Honor, unless your Honor has any questions.
11:23:32 THE COURT: No, we've exhausted the
11:23:33 possibilities.
11:23:34 MR. MOORMAN: Sorry, sorry. I did have one
11:23:38 more comment. The one thing FMC has been saying over
11:23:43 and over again is that 9.7 doesn't reference patent
11:23:48 challenges. It doesn't say patent challenges. There is
11:23:51 a very obvious answer to why it doesn't. It says any

11:23:54 controversy or claim arising out of the parties' agreement. It encompasses everything. It doesn't need to specifically call out patent challenges to cover patent challenges. He also flips the burden. He argues that 4.3 doesn't cross reference 9.7. 4.3 is expired, to the extent it is going to have a lasting impact on 9.7, it better state what the lasting impact was. And the sort of positive assurance you would expect to see if 4.3 was supposed to have the impact that FMC argues, you would see something like you see in contracts all the time, say something like notwithstanding anything to the contrary in section 9.7, patent challenges shall not be arbitrable. Some sort of positive definitive language. That is the sort of cross reference you would see in 4.3 if it was intended to have the effect that FMC advocates for. You see nothing like that. You see, at most, shed a little light, give a little hint, that is not the plausible assurance that the Second Circuit requires.

THE COURT: All right. Of course --

MR. BUTSWINKAS: I'm sorry, I always hate this.

THE COURT: That's all right. It's kind of fun.

11:25:07 MR. BUTSWINKAS: I want to correct one factual error. When he says the patent challenges, 11:25:09 which he concedes are patent challenges, are not under 11:25:13 the agreement that is dead wrong. They are clearly 11:25:17 Canadian challenges to candidate herbicide lead area 11:25:21 patents and they relate to the SGF45 lead area patents, 11:25:24 which is a part of this group of patents. And for him 11:25:30 to say, and by the way, it took him an opening brief, a 11:25:33 reply brief and three arguments for him to come up with, 11:25:37 that is dead wrong. And that is all I have to say. 11:25:41

11:25:43 THE COURT: Thank you. I'll get to work on 11:25:45 all of this. And thank you, again, for all of the hard 11:25:49 work. It's been a pleasure.

11:25:52 MR. MOORMAN: Thank you, your Honor.

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I certify that the foregoing is a correct transcript of the record to the best of my ability of proceedings transcribed from the audio in the above-entitled matter.

S/ Karen J. Clark, RPR

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